Clause 1 is a town planning and development consultancy. We specialise in assisting property developers, architects and building designers meet the increasingly complex requirements of State and Local Government planning controls. Our services include: Pre-project planning consulting, planning permit applications, planning Scheme amendments, subdivisions, planning mediation, VCAT representation, panel submissions and covenant removals. If you would like to discuss how we can assist you please contact us on 03 9370 9599 or visit www.clause1.com.au

1.0 Applying for Costs at VCAT

Introduction

Clients commonly ask us whether it is possible to seek compensation for costs and delays caused by Victorian Civil and Administrative Tribunal (VCAT) proceedings to which they have been unwillingly subjected.

The following article provides an overview of the general principles relating to the awarding of costs at VCAT in planning matters.

This article should not be viewed as a complete guide, rather it should be used as an overview of general principles that are subject to reinterpretation and change. As always, we highly recommend discussing specific cases with a town planning consultant prior to lodging any application to VCAT.

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The power to award costs

Section 109(1) of the VCAT Act 1998 prescribes that each party to a proceeding is to bear their own costs associated with a VCAT appeal. This includes preparation of town planning drawings, professional representation, and expert witnesses. In the vast majority of planning cases heard at VCAT this general rule is upheld.

However, VCAT does have the discretion to make orders requiring one party to pay the costs incurred by other parties associated with a proceeding. Although rarely exercised in common planning matters, VCAT can award costs if it is satisfied that it is fair to do so, having given due regard to a number of considerations.

How much and for what?

At any time, the Tribunal may order that a party pay all or a specified part of the costs incurred by any other party in a proceeding. Amounts awarded will generally only include costs directly associated with the subject proceedings. Importantly, costs awarded under Section 109 of the VCAT Act do not extend to damages or losses due to a project being held up at VCAT.

VCAT has awarded costs in previous cases that include expenses associated with:

- The preparation and representation of a planning consultant or barrister at a hearing;
- The preparation and appearance of expert witnesses at a hearing;
- The work of an architect/building designer;
- Car parking or travel relating to proceedings;
- Disbursements relating to preparation of submissions.

Unnecessary disadvantage incurred

The primary test for the awarding of costs requires that an *unnecessary disadvantage* be incurred by one party as a result of the conduct of another party in the proceedings.

The definition of *unnecessary disadvantage* does not generally include that resulting from normal applications lodged at VCAT by persons exercising the rights of review afforded them under the Planning and Environment Act. Rather, there is generally required to be some conduct that goes beyond the normal and reasonable bounds of a proceeding to warrant an awarding of costs.

Past examples of this have been undue delays caused by the conduct of a party, for instance a failure to attend a hearing (and therefore causing an adjournment) without a reasonable excuse, in which case the other parties who attended the hearing sought reimbursement of professional representation fees incurred on the day when the hearing was adjourned. In *Moorabool SC v Colosimo [2007] VCAT 1367*, the Tribunal awarded approximately $11,000 to Council when a respondent

in an enforcement proceeding failed to attend the Hearing and provided no reasonable excuse for their non-attendance, despite being prompted several times by the Tribunal. The amount awarded matched the invoices tendered by Council for legal representation and preparation for a full hearing which never eventuated.

Numerous attempts have been made to seek costs against parties whose grounds were deemed to be so weak as to be 'untenable' in fact or law, which is a provision set down at s 109 (3) (c) of the Act. A review of caselaw shows that this has been applied very sparingly by the Tribunal, who found the test for something being 'untenable' is a very high bar and even very weak arguments are not often found to be 'untenable' pursuant to s 109 (3) (c).

Representatives of parties

If the Tribunal considers that the representative of a party, rather than the party itself, is responsible for conduct resulting in a costs application, the Tribunal may order that the *representative* in his or her own capacity compensate the disadvantaged party for any costs unnecessarily incurred.

Conduct of parties that may result in the awarding of costs?

Under Section 109 the Tribunal has the ability to consider any matter it deems is relevant when determining an application for costs. Generally the following conduct is considered to be of a type that may result in costs being awarded:

- Initiating vexatious proceedings against other parties;
- Initiating proceedings with no basis in fact or law;
- Behaving in a vexatious manner throughout a proceeding;
- Causing any unnecessary delay to a proceeding;
- Failing to comply with the relevant Acts, regulations and VCAT's procedural requirements;
- Failing to comply with VCAT orders without reasonable excuse. In extreme cases this may also result in contempt charges being laid;
- Initiating proceedings for the purpose of securing or maintaining a direct or indirect commercial advantage;
- Any attempt to deceive VCAT or other parties to a proceeding;

Importantly, we note that proceedings may be considered to be vexatious if initiated with the intention of annoying or embarrassing the person against whom they are brought, if brought for collateral purposes and not for the purpose of having VCAT adjudicate on the issues which they give rise. In Lord Haven Pty Ltd v Greater Dandenong CC [2000] VCAT 1873, an appeal brought to the Tribunal in the interest of 'commercial advantage' by one licenced premises against another resulted in the costs being awarded to the aggrieved party.

Awarding of costs against Council

Anecdotal evidence indicates that Councils are more likely to have costs awarded against them in planning matters at VCAT than other parties. This is generally because Council is not only responsible to ensure their conduct is appropriate during VCAT proceedings (as outlined above), they are solely responsible for ensuring the appropriate consideration of planning and other applications prior to matters being bought to VCAT.

In addition to the conduct outlined above costs may be awarded against Councils as a result of:

- Improper processing of an application;
- Irrelevant and improper consideration of an application;
- Unreasonably withholding consent;
- Wrongly or invalidly issuing a permit or granting consent.

A note about enforcement proceedings & Section 89 applications

Under Section 89 of the Planning and Environment Act any person who objected to or would have been entitled to object to a permit may apply to the Tribunal to have that permit cancelled or amended on specific grounds, which include;

- Not being served notice of the application in the correct manner;
- The application being incorrectly described or matters being concealed;
- Substantial failure to comply with the conditions of a permit;
- A material mistake made in the granting of the permit.

The implications of Section 89 applications can be severe. Amending or cancelling a planning permit after it has been issued and the delay and expense of defending such an application can cause significant detriment to the permit holder. It is for that reason a higher proportion of these proceedings result in the awarding of costs.

Similarly, costs appear to be awarded more often in proceedings relating to matters of enforcement than general planning permit applications. These proceedings are usually bought by Councils attempting to rectify a breach of the P&E Act as a last resort, after exhausting all other methods. If the application is upheld it is not uncommon for VCAT to order the delinquent party to pay Council's costs, and vice versa.

The risk of having costs awarded against you

Although the awarding of costs in common planning matters is not the norm, it does occur. To avoid an order for costs, parties engaged in VCAT proceedings should:

- Understand and take on board the above principles;
- Always conduct themselves in a professional and courteous manner;
- Ensure any application brought to VCAT has merit;
- Enter into VCAT proceedings and mediations in good faith with the aim of resolving the issues under review;
- Always adhere to VCAT Orders and procedural practice notes and timeframes and;
- Seek professional town planning advice specific to their case prior to appealing to VCAT.

Seeking costs against another party

Any party seeking to be awarded costs against another party to their proceedings most commonly make applications to VCAT pursuant to Section 109 of the Victorian Civil and Administrative Tribunal Act or Section 150 of the Planning and Environment Act.

An application for costs should clearly outline;

- Under which section and subsection of the Act the proceedings have been bought;
- The value of costs sought;
- How those costs where incurred and;
- The conduct of the offending party considered to have caused the unnecessary incursion of those costs.

Clause:1 recommends that parties to VCAT proceedings consider applying for costs in only the most extenuating circumstances and consult a planning expert prior to making any such applications.

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